Prosecuting Individuals for the Crimes of the Group: Whether the International Criminal Court Should Expand Criminal Liability to Corporations and Organisations

By: Dr. Caleb H Wheeler
Lecturer in Law, Middlesex University
The Burroughs
London NW4 4BT
C.wheeler@mdx.ac.uk

Introduction

It was agreed during the Rome Conference that the Statute of the International Criminal Court would only allow individuals to be held criminally responsible for the crimes contained in the Statute. This decision has had the effect of excluding human rights abuses committed by corporations and non-government organisations from the jurisdiction of the court. Now, twenty years later, there is a renewed debate about whether corporations and non-governmental organisations should be exposed to prosecution by the International Criminal Court. The failure to include corporations and non-government organisations is seen as creating an enforcement gap that fundamentally undermines the Court's oft-stated mission to end impunity. Crimes allegedly engaged in by Chiquita Brands International, Inc. in Colombia and United Nations' peacekeepers in the Central African Republic are an example of possible criminal activity committed by organisations and act as a starting point for examining whether organisations should be held criminally accountable for their actions. The vital role that organisations play in the commission of atrocity crimes demonstrates that prosecuting the group, in addition to any individual members of the group, will help close the impunity gap at the International Criminal Court by creating increased accountability and enhancing the protection of human rights. Taking measures to close this impunity gap will allow the International Criminal Court to comply with the directive contained in the Preamble of the Universal Declaration of Human Rights that 'every organ of society' act to promote respect for human rights so as to 'secure their universal and effective recognition and observance'.[1]

Examples of organisational participation in atrocity crimes can be found in the context of both corporations and non-governmental organisations. In May 2017, three

[1] UN General Assembly, Universal Declaration of Human Rights (10 December 1948) preamble.

non-governmental organisations submitted an Article 15 Communication to the International Criminal Court ('the Communication') seeking the expansion of the Office of the Prosecutor's ongoing preliminary investigation in Colombia to include corporate officials of Chiquita Brands International, Inc. ('Chiquita'). [2] The Communication alleges that corporate officials employed by Chiquita made recurring payments to affiliates of the paramilitary group *Autodefensas Unidas de Colombia* ('AUC'), despite the fact that those officials were aware that the AUC was committing crimes against humanity.[3] The payments were made as part of a corporate policy for the purpose of protecting Chiquita holdings in Colombia from harm threatened by the AUC if the payments were not made.[4] Chiquita continued to make payments to the AUC even after it was declared a 'Foreign Terrorist Organization' by the government of the United States and despite the fact that Chiquita had been advised that it was acting illegally by continuing to pay the AUC.[5] Chiquita only stopped making payments to the AUC several months before entirely divesting itself of its Colombian operations.[6] It is asserted that the money paid by Chiquita represented a significant contribution to the human rights abuses committed by the AUC.[7]

Corporations are not the only types of organisations that commit potential human rights violations. Allegations have been made against a number of different international organisations involving crimes that, if proven, could fall under the jurisdiction of the International Criminal Court. One example of this sort of organisational criminality is detailed in a 2015 independent report, which found that members of a United Nations peacekeeping mission in the Central African Republic

---

[2] *The contribution of Chiquita corporate officials to crimes against humanity in Colombia: Article 15 Communication to the International Criminal Court*, International Human Rights Clinic, Colectivo de Abogados José Restrepo, Fédération Internationale des Ligues des Droits de l'homme (May 2017) § 1 ('Chiquita Communication').

[3] Ibid.

[4] Ibid at §§ 21, 23.

[5] *United States of America v Chiquita Brands International, Inc* (Factual Proffer) United States District Court for the District of Columbia, No. 1:07-cr-00055-RCL-1 (19 March 2007) §§ 29, 56, 62.

[6] Ibid at § 87; Cliff Peale, 'Chiquita Sells Colombia Unit', *Cincinnati Enquirer* (12 June 2004) available online at <www.enquirer.com/editions/2004/06/12/biz_biz1 achiq.html> (accessed 25 July 2018).

[7] Chiquita Communication (n 2) § 21.

sexually abused children in exchange for money and food.[8] The report suggests that the behaviour of the peacekeepers could constitute crimes against humanity and war crimes under the Rome Statute.[9] The report went on to conclude that the Human Rights Justice Section ('HRJS') of the UN Mission to the Central African Republic failed to properly report the abuse, to intervene to stop the abuse from continuing or to hold the perpetrators accountable for their actions.[10] These failures were contextualised as the latest in a series of similar problems experienced during other peacekeeping missions and were thought to represent 'a culture of impunity' and a 'bureaucratic culture in which many are not willing to take responsibility for addressing the violations'.[11] While the departments of the United Nations implicated were not directly involved in the crimes committed by the peacekeepers, they could be seen as being complicit, both through the climate of impunity they fostered and their inaction in preventing future criminal activity.

The situations in Colombia and the Central African Republic are meant to highlight two ways in which different types of organisations might be liable for human atrocity crimes. However, despite the clear institutional involvement in crimes committed in both Colombia and Central African Republic, neither situation will result in the organisations involved being held accountable for their actions. Article 25 of the International Criminal Court's Statute limits criminal responsibility to natural persons, i.e. individuals, and does not permit corporations or other organisations to be charged with crimes falling under the Statute.[12] The decision to exclude organisational liability from the Rome Statute echoes the finding of the

[8] 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (17 December 2015) at 17-21 <www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf> (accessed 10 July 2018).

[9] Ibid at 21, footnote 65.

[10] Ibid at 33.

[11] Ibid at 4.

[12] Rome Statute of the International Criminal Court opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 25; see also Norman Farrell, 'Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals' (2010) 8 *Journal of International Criminal Justice* 873, 874; Michael J Kelly, 'Prosecuting Corporations for Genocide under International Law' (2012) 6 *Harvard Law & Policy Review* 339, 346; Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 *Chinese Journal of International Law* 43, 44.

International Military Tribunal at Nuremberg that '[c]rimes against International Law are committed by men not abstract entities'.[13] However, this oft-cited statement may be misleading to the extent that it suggests that the role of organisations is irrelevant or secondary to any discussion about international crimes.[14]

The History of Organisational Criminal Liability at the International Criminal Court

There has been a debate about whether the International Criminal Court should be able to try organisations since efforts to create the court were revived in the early 1990s. A report prepared in 1993 by the International Law Commission's Special Rapporteur for the 'Draft Code of Crimes Against the Peace and Security of Mankind', was the first to address whether to include liability against organisations in the statute of the prospective International Criminal Court. The report unequivocally indicated that Working Group on a draft statute for an International Criminal Court 'agreed that the jurisdiction of the court would apply solely to individuals.'[15] This position was reflected in the subsequent draft statutes prepared by the International Law Commission, both of which identified individual criminal responsibility without mentioning any form of organisational liability.

The discussion surrounding whether other forms of liability should be included in the Statute of the prospective International Criminal Court was first raised in the second annex of the *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*.[16] A list of substantive issues that 'could be discussed' included the entry, 'Criminal liability of corporations?'[17] There was no further comment about the entry, although the decision to conclude it with a question mark suggests one of two things. A question existed as to whether the proposed court

[13] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 22 (1947) 465.
[14] William A Schabas, 'State Policy as an Element of International Crimes' (2008) 98(3) *Journal of Criminal Law and Criminology* 953, 953.
[15] International Law Commission, *Yearbook of the International Law Commission 1993, Volume 2 part 2: Report of the Commission to the General Assembly on the work of the forty-fifth session* (United Nations 1995) § 64.
[16] Ad Hoc Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* (United Nations 1995) 58.
[17] Ibid.

should impose this sort of liability or whether it was worth discussing the idea at all. The answer would appear to be the former as the issue was raised again during the negotiations of the draft statute prepared by the Preparatory Committee in 1996. A summary of the discussion on organizational liability indicated that it had been discussed and the delegations had expressed a variety of views both for and against the idea.[18]

This diversity of opinions expressed in this discussion was reinforced in the draft statute produced by the Preparatory Committee. It contained two proposals addressing criminal responsibility. The first limited the jurisdiction of the court to 'natural persons', although that limitation was without prejudice to the responsibility of states under international law.[19] The second proposal permitted the court to 'take cognizance of the criminal responsibility of: (a) Physical persons;' and '(b) Juridical persons'.[20] The term 'juridical persons' is not defined although the proposal specifically excludes states from being considered juridical persons. Additionally, a note appended to the proposal indicated that some delegations had advocated for a definition that included organisations without a legal status.[21] This suggests that, at a minimum, a 'juridical person' is any organisation with a legal status that is not a state. Unlike natural persons, the proposal limited the potential liability for juridical persons to 'crimes committed on behalf of such juridical persons or by their agencies or representatives.[22] The proposal does note that not all of the delegations supported the idea of holding juridical persons accountable.[23] This proposal survived in substantially the same form throughout the remainder of the negotiations leading up to the Rome Conference with the only minor difference being that the term 'juridical persons' was replaced with 'legal persons'.[24]

[18] Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Vol 1* (United Nations 1996) § 194.
[19] Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Vol 2* (United Nations 1996) §§ 80-1.
[20] Ibid at §81.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Preparatory Committee on the Establishment of an International Criminal Court, 'Draft Statute of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998) as reprinted in *Official Records of the United Nations*

The conversation about whether to include organisational liability continued during the Rome Conference. As these discussions developed it became clear that the broad definition contained in the Preparatory Committee's proposal would be narrowed to focus specifically on corporate criminal liability. France introduced a working paper during the negotiations that would have extended the Court's jurisdiction to include juridical persons, but limited its definition of the term to 'a corporation whose concrete, real or dominant objective is seeking private profit or benefit'.[25] Under this proposal, any possibility to hold a non-corporate organisation accountable for its actions was extinguished. Despite containing a rather limited form of liability, the proposal was ultimately rejected and the final statute only included individual liability provisions.[26]

Two viewpoints have emerged as to why organisational liability was not included in the Rome Statute. The first suggests that the differences between the delegations were too great for agreement to be reached. Kai Ambos goes so far as to state that corporate liability was 'rejected' for reasons that he finds 'quite convincing.'[27] William Schabas is more measured in his analysis, however he does indicate that the complementarity concerns surrounding corporate criminal liability acted as 'an insurmountable obstacle to consensus'.[28] The second perspective focuses more on the idea that the inability to reach agreement was the result of too little time rather than an intractable difference of opinion. Per Saland recognized that the issue of the criminal responsibility of legal entities 'deeply divided the delegations' but also remarked that a 'relatively broad majority' came to accept its inclusion in the

---

Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Reports and Other Documents) Vol III (United Nations 1998) 31.

[25] Working Group on General Matters of Criminal Law, *Working Paper on Article 23, paragraphs 5 and 6*, Doc. No. A/CONF.183/C.1/WGGP/L.5/REV.2 (3 July 1998), *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Reports and other documents)* vol 3(1998) 252.

[26] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed, OUP 2016) 566.

[27] Kai Ambos, 'Article 25: Individual Criminal Responsibility', in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (CH Beck 2015) 986; Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *Criminal Law Forum* 1, 7.

[28] Schabas ICC Commentary (n 26) 564.

Statute.[29] Despite this growing consensus, it was felt that there was not enough time to address the substantive and procedural issues that inclusion would entail, and as a result, organisational liability was not included in the final statute.[30]

The Case for Organisational Criminal Liability

In the end, it is of no real consequence whether organisational liability was omitted from the statute due to lack of consensus or lack of time; we are left with a Rome Statute that only allows for individual liability. However, the exclusion of liability for legal entities does not mean that organisations are irrelevant in international criminal law. In fact, every international criminal trial has involved multiple perpetrators acting on behalf of an organisation, usually the state.[31] The important role organisations play in international criminal law is also reflected in the acts criminalized in the Rome Statute. Individual guilt for all four of the crimes contained in the Rome Statute entails some element of organisational activity.[32] Additionally, with the exception of the crime of aggression, in which the group activity involved is necessarily that of the state, it is possible that the indispensible group involvement in the crimes tried at the International Criminal Court can be performed by non-state entities.[33]

Liability for crimes against humanity, as expressed in Article 7 of the Rome Statute, requires the accused to have committed one or more of a number of different acts, and those acts must be performed 'as part of a widespread or systematic attack

[29] Per Saland, 'International Criminal Law Principles', in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) 199.
[30] Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in M.T. Kamminga and S. Zia-Zarifi (eds), *Multinational Corporations Under International Law* (Kluwer Law International 2000) 157; William A Schabas, *An Introduction to the International Criminal Court* (CUP 2017) 211.
[31] Jens David Ohlin, 'Organizational Criminality', in Elies van Sliedregt and Sergey Vasiliev, *Pluralism in International Criminal Law* (OUP 2014) 116; Schabas State Policy (n 14) 954.
[32] George Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt' (2002) 111 *The Yale Law Journal* 1499, 1514.
[33] Rome Statute (n 12) art 8 *bis*(1).

directed against a civilian population'.[34] The Statute goes on to clarify that a fundamental component of an '[a]ttack directed against a civilian population' is that it occurs 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.[35] The International Criminal Court's Elements of Crimes reiterates this requirement and elaborates on it to the extent that a deliberate failure to act might also constitute a State or organisational policy.[36] This requirement is also reflected as a distinct element of each potential type of crime against humanity described in the Elements of Crimes.[37] This is particularly relevant in the context of the crimes committed by United Nations' peacekeepers in the Central African Republic. There, it is alleged, that the United Nations deliberately failed to act to prevent future crimes and to discipline the perpetrators of sexual violence against children.[38]

Whether the inclusion of organisational policies in Article 7 extends to non-state organisations is a matter of some debate. The use of the disjunctive word 'or' between state and organisational in Article 7 suggests that the policies of non-state actors can serve as the basis for crimes against humanity. However, Cherif Bassiouni argues that 'the words "organisational policy" do not refer to the policy of any organisation, but are limited state policies.'[39] Professor Bassiouni bases this opinion on the language of Article 7(2), which he feels refers exclusively to state policy.[40] Professor Schabas agrees that the term should not apply to non-state actors but does expand it to encompass 'State-like actors' and groups within the state governmental structure that do not necessarily represent the entire state.[41] Jens David Ohlin seems less interested in imposing such limitations on the nature of the organisation and

[34] Rome Statute (n 12) art 7(1).
[35] Ibid at art 7(2)(a).
[36] International Criminal Court, Elements of Crimes (2011) 5.
[37] Ibid at 5-12.
[38] Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (17 December 2015) at 33 <www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf> (accessed 10 July 2018).
[39] M Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, vol 1 (Transnational Publishers 2005) 152.
[40] Ibid.
[41] Schabas State Policy (n 14) 973.

instead emphasises the indispensability of the collective when proving crimes against humanity.[42]

A similar organisational requirement is also found in Article 8, the statutory provision on war crimes. The International Criminal Court has jurisdiction over war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.'[43] This formulation is more equivocal than that found in Article 7 about crimes against humanity and allows for the possibility that a single war crime can be committed without it necessarily being part of an organisational plan or policy. However, as the Elements of Crimes makes clear, all war crimes must take place within the context of an international or non-international armed conflict.[44] The term 'armed conflict' is not defined in either the Rome Statute or the Elements of Crimes. Therefore, in the International Criminal Court's first judgment in the *Lubanga* case, Trial Chamber I adopted the definition set out by the Appeals Chamber of the *ad hoc* Tribunals in *Tadić*.[45] According to *Tadić*, an armed conflict exists 'whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State.' This definition demonstrates that the involvement of a group or organisation is necessary for an armed conflict to exist, which in turn is a fundamental element of all war crimes. Also, while the necessary group activity will often be attributable to the State, the definition does not require the involvement of the State. Therefore, without the involvement of a group there could be no war crimes.

While war crimes can only take place in the context of an armed conflict, which is by its very definition an activity that requires group involvement, Article 8 does allow for the possibility that a single act performed by an individual could constitute a war crime. Unlike crimes against humanity, which must take place 'pursuant to or in furtherance of a State or organizational policy', war crimes are 'committed as part of a plan or policy or as part of a large-scale commission of such

[42] Ohlin (n 31) 118-19.
[43] Rome Statute (n 12) art 8(1).
[44] ICC Elements of Crimes (n 36) 13-42.
[45] *Prosecutor v Lubanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/06, T Ch (14 March 2012) § 533; *citing Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72, A Ch (2 October 1995) § 70.

crimes.'[46] This different formulation of war crimes does not demand that the plan or policy be attributable to the State or another organisation. Instead, it leaves open the possibility that a plan or policy developed by an individual could suffice to meet this requirement. However, it could be challenging to prove that such a plan or policy was sufficiently associated to the armed conflict, or that it met the gravity threshold, to constitute a war crime. Further, while the 'large-scale commission' of war crimes does not explicitly require the involvement of a group, it is difficult to envision a sufficiently 'large-scale commission' of crimes necessary to rise to the level of war crimes that does not involve some component of organisational involvement. Therefore, while it is theoretically possible for war crimes to occur without the participation of an organisation, it is unlikely that such will be so in practice.

The crime of genocide differs from the other three crimes in the Rome Statute because it does not explicitly mention group involvement in the definition of the crime. Instead, the group is only referenced to the extent that the criminal acts must be directed at a 'national, ethnical, racial or religious group'.[47] This supports the idea that genocide could, theoretically, be committed by a lone genocidiare not acting in accordance with a larger organisational plan or policy. However, the addition of a contextual element to each form of genocide in the Elements of Crimes subverts that notion. The final element of each type of genocide states '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.'[48] Some commentators have interpreted this element as requiring the existence of an organisational plan or policy for the crime of genocide to be committed.[49] This view does not accord with the case law of the *ad hoc* tribunals, which have consistently held that an organisational policy or plan to commit genocide is not a necessary element of genocide but that the existence of such a policy or plan can act as an important indicator of the accused individual's intent.[50] However, the position taken by the *ad hoc* tribunals has been

[46] Rome Statute (n 12) arts 7(1) and 8(1).
[47] Rome Statute (n 12) art 6(1).
[48] ICC Elements of Crimes (n 36) 2-4.
[49] Ohlin (n 31) 121.
[50] Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (3d ed, OUP 2014) 309; *citing Prosecutor v Jelisić* (Judgement) IT-95-10-A, A Ch (5 July 2001) § 48; *Prosecutor v Krstić* (Judgement) IT-98-33-A, A Ch (19 April 2004) §§ 223 et seq; *Semanza v Prosecutor* (Judgement) ICTR-97-20-A, A Ch (20 May 2005)

criticised as 'superficial' and a 'results-oriented political decision'.[51] Further, even if an organisational plan or policy is not a necessary element of genocide, the 'massive and systematic nature' of the crime 'presupposes collective organization.'[52]

Organisational involvement in international criminal law is not limited to the direct role organisations play in the commission of the crimes contained in the Rome Statute. Organisations are also indirectly involved in individual criminal liability in a number of different ways. In many cases, organisations provide individuals with the ability to commit international crimes. The institutional context of the organisation will often provide the individual with 'the motive, opportunity and means' to commit criminal acts.[53] Additionally, feeling connected to a larger organisation can also diminish an individual's sense of moral responsibility and increase their sense of security.[54]

The significant role organisations necessarily play in international crimes begs the question: Why is liability for international crimes exclusively reserved for individuals? This question is particularly relevant when taking into account one of the oft-repeated purposes of the International Criminal Court, 'to put an end to impunity for the perpetrators' of atrocity crimes so as 'to contribute to the prevention of such crimes'.[55] The failure to prosecute organisations for their role in committing atrocity crimes represents a gap in criminal liability and does not fulfil the International Criminal Court's promise 'to put an end to impunity'.[56] Limiting criminal liability to individuals leaves organisations relatively free to participate in the commission of atrocity crimes without fear of punishment.

---

§ 260; *Simba v Prosecutor* (Judgement) ICTR-01-76-A, A Ch (27 November 2007) § 260.

[51] Schabas State Policy (n 14) 959.

[52] Pierre-Marie Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1090.

[53] Maurice Punch, 'Why Corporations Kill and Get Away With It: The Failure of the Law to Cope With Crime in Organizations', in André NollKaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 56.

[54] *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, vol 8 (1947) 354.

[55] Rome Statute (n 12) preamble.

[56] Nadia Bernaz, 'Corporate Criminal Liability Under International Law: The *New TV S.A.L.* and *Akhbar Beirut S.A.L.* Cases at the Special Tribunal for Lebanon' (2015) 13 *Journal of International Criminal Justice* 313, 319.

Ineffective national laws designed to impose criminal liability on organisations and/or their individual employees or members have driven efforts to provide for organisational criminal liability in international law.[57] Many individual states are often unwilling or unable to adequately regulate human rights abuses committed by organisations within their jurisdiction.[58] This is particularly true of corporations where the imposition of liability is inhibited by: a lack of financial or legal resources to properly investigate and prosecute alleged crimes; a lack of jurisdiction to investigate and prosecute crimes allegedly committed by multinational corporations in more than one country; the fear that corporations will relocate their operations, or redirect foreign direct investment, away from countries attempting to investigate or prosecute; the participation of government officials in the crimes alleged against the corporation; or a preference for financial investment over the enforcement of human rights norms.[59]

Creating international jurisdiction over crimes committed by organisations, and permitting the International Criminal Court to serve as an appropriate venue, has the potential to close this impunity gap by promoting the deterrent function of criminal law. Knowing that their actions will have criminal consequences could specifically deter organisations from participating in atrocity crimes.[60] Specific deterrence is believed to prevent atrocity crimes through the public stigma and reputational injury that accompanies any suggestion of an individual or group's

[57] Larissa van der Herik and Jernej Letnar Černič, 'Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again' (2010) 8 *Journal of International Criminal Justice* 725, 741.
[58] Kathryn Haigh, 'Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns' (2008) 14(1) *Australian Journal of Human Rights* 199, 200; Joanna Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objection Laid Bare' (2008) 19(1) *Criminal Law Forum* 115, 146-47.
[59] Van den Herik and Černič (n 57) 741; see also Mordechai Kremnitzer, 'A Possible Case for Imposing Corporate Liability on Corporations in International Criminal Law' (2010) 8 *Journal of International Criminal Justice* 909, 916-17; Haigh (n 58) 200; Kyriakakis Complementarity Issues Laid Bare (n 58) 146-47.
[60] Joanna Kyriakakis, 'Corporations Before International Criminal Courts: Implications for the International Criminal Justice Project' (2017) 30(1) *Leiden Journal of International Law* 221, 236; Clapham (n 30) 147.

involvement in such crimes.[61] Corporations are especially predisposed towards specific deterrence because they are meant to function as rational actors whose decisions are not emotionally or socially motivated.[62] However, although the decisions of corporations are meant to be rational and driven by a cost-benefit analysis, it is entirely possible that the rational decision will be to commit human rights abuses as doing so will be in the best interests of the corporation. That is, the corporation may decide to continue to participate in atrocity crimes if it believes that the benefit of their criminal activity outweighs any potential detriment caused by public stigma and reputational injury. Support for this can be found in the form of Chiquita's actions in Colombia as evidenced by its decision to continue to pay protection money to the AUC even after learning that the AUC was a violent paramilitary group and after being advised that it was illegal to continue to make the payments.[63]

Prosecuting organisations for human rights abuses could also act as a general deterrent. General deterrence is the theory that punishing the perpetrators of atrocity crimes will 'dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.'[64] Punishing organisational perpetrators of atrocity crimes is achieved in two steps: first, it transforms popular perceptions of acceptable organisational behaviour; and second, it promotes the gradual internalisation of those values leading to 'habitual conformity' with the law.[65] Much as with specific deterrence, it is thought that the stigmatisation resulting from criminal prosecutions for atrocity crimes, and the resulting financial losses potentially arising out of that stigma, will force organisations to comply with

[61] Robert D Sloan, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 39, 73-4.
[62] Kyriakakis Corporations Before International Criminal Courts (n 60) 236-37.
[63] Factual Proffer (n 5) §§ 22, 29, 56, 62.
[64] *Prosecutor v Rutaganda* (Judgement and Sentence) International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-96-3-T, 6 December 1999, § 456.
[65] Payam Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 *Human Rights Quarterly* 737, 747; see also Eric Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court' (2006) 44 *Columbia Journal of Transnational Law* 801, 828.

the law so as not to negatively effect their operations.[66] Deterring organisations in this way will have the effect of improving the global human rights situation.

The application of organisational criminal liability has not gained universal acceptance despite the demonstrable benefits it could have on protecting human rights. There are two main issues preventing greater acceptance of this concept: 1) a concern that the complementarity principle contained in the Rome Statute prevents the imposition of organisational liability; and 2) the fear that any form of group liability will have the tendency to minimise individual liability. Many commentators see the complementarity principle as a significant obstacle to imposing organisational criminal liability at the International Criminal Court.[67] The Preamble and Article 1 of the Rome Statute introduce the complementarity principle by emphasizing that the Court's jurisdiction will be complementary to national criminal jurisdictions.[68] The principle is made operative through Article 17. It makes clear that the jurisdiction of the International Criminal Court is meant to complement domestic criminal jurisdiction, and that cases will be inadmissible before the International Criminal Court unless the State in which a domestic trial could take place is 'unwilling or unable genuinely to carry out the investigation or prosecution.'[69] The purpose of the principle is to ensure that the International Criminal Court is one of secondary jurisdiction that will only prosecute when confronted with an impunity gap caused by a State's unwillingness or inability to prosecute.[70] Making the jurisdiction of the International Criminal Court subordinate to domestic jurisdiction prevents it from intruding on a State's proper exercise of its domestic criminal jurisdiction.[71]

Group criminal activity raises complementarity concerns because there is no uniformity in national jurisdictions about whether organisations can be exposed to criminal liability or how such liability should apply. States that do not impose this form of criminal liability are apprehensive that an interpretation of Article 17 that allows for prosecutions under these circumstances could represent an infringement on

---

[66] Clapham (n 30) 147.
[67] Ambos General Principles (n 27) 7; Ambos Article 25 (n 27) 986; William A Schabas ICC Commentary (n 26) 564; Schabas Introduction to the ICC (n 30) 211.
[68] Rome Statute (n 12) preamble and art 1.
[69] Ibid at art 17(a).
[70] Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (Oxford University Press, 2016) 269.
[71] Ibid.

their sovereignty by effectively imposing criminal liability even when national laws do not.[72] It is their belief that to impose liability under these circumstances violates the principle of complementarity because it extends criminal liability into areas in which it does not already exist in national law. This differs from the traditional formulation of complementarity where the International Criminal Court will only pursue a prosecution when the relevant domestic legal system 'is unwilling or unable' to exercise its jurisdiction and the suspected behaviour is criminalised both domestically and internationally.

In response, some commentators have argued that the failure to criminalise organisational criminal activity renders those States unable to prosecute within the meaning of Article 17.[73] Inability to prosecute is defined in Article 17(3) of the Rome Statute as a situation where, 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.'[74] Antonio Cassese extends this definition and argues that inability also encompasses situations in which a national legal system is unable to prosecute an accused, 'not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments'.[75] Joanna Kyriakakis builds on Cassese's position by asserting that a legislative impediment results when there are no laws endowing courts with legal competence organisations.[76] This impediment effectively renders domestic courts unavailable to prosecute, in turn producing an inability to prosecute.[77] These arguments lead to the conclusion that States that do not impose criminal liability on corporations are unable to prosecute within the meaning of the Rome Statute thus allowing for prosecutions at the International Criminal Court.

Another way to look at complementarity in this context may be to focus on the plain language of the Statute. Article 17(1)(a) states, 'a case is inadmissible where: (a) [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or

[72] Ibid.
[73] Haigh (n 58) 204.
[74] Rome Statute (n 12) art 17(3).
[75] Antonio Cassese, et al, *Antonio Cassese's International Criminal Law* (3rd ed, OUP 2013) 297.
[76] Kyriakakis Complementarity Issues Laid Bare (n 58) 127.
[77] Ibid.

prosecution'.[78] The important phrase to focus on in this context is 'a State which has jurisdiction over it'. It could be argued that when a State does not criminalise the behaviour of an organisation in its national law, and an organisation commits a potentially criminal act within the territory of that State, there is no State with jurisdiction. The exercise of jurisdiction requires the existence of two different components, jurisdiction *ratione materiae* and jurisdiction *ratione personae*, i.e. the must be able to exercise jurisdiction over both the subject matter and the parties to a dispute. When a State does not criminalise organisational behaviour it does not have both forms of jurisdiction over the matter and therefore cannot be described as 'a State with jurisdiction'. If there is no State with jurisdiction within the meaning of the Statute then Article 17(1)(a) cannot act to render a case inadmissible at the International Criminal Court. This means that there is no real complementarity issue and that the Court could exercise its jurisdiction over groups located in States that do not criminalise organisational activity if it were to expand its own jurisdiction to encompass corporations.

Supporters of imposing organisational criminal liability at the International Criminal Court have tried to find other ways to avoid the complementarity concerns of those States that do not permit organisational criminal liability. One suggestion relating specifically to corporations has been to create an exception under which corporations that are incorporated in States that do not criminalise corporate behaviour will be excluded from liability at the International Criminal Court.[79] This proposal is fatally flawed. An exception that acts to shield corporations from liability based on its location or place of incorporation would only encourage corporations to relocate to those States that do not impose organisational criminal liability. In turn, nations that currently hold corporations criminally liable for their actions would be disinclined from doing so in an effort to prevent corporations from moving their bases of operations. It could also lead States Parties to the Rome Statute that hold corporations accountable for their criminal actions to leave, or threaten to leave, the International Criminal Court, much as some African Nations have done over the issue of head of state immunity. Ultimately, an exception like the one described above

[78] Rome Statute (n 12) art 17(1)(a).
[79] Haigh (n 58) 211; Mohammed Saif-Alden Wattad, 'Natural Persons, Legal Entities, and Corporate Criminal Liability Under the Rome Statute' (2016) 20 *UCLA Journal of International Law & Foreign Affairs* 391, 418.

would have the tendency to diminish, rather than increase, the enforcement of criminal liability against corporations.

A second worry about implementing organisational criminal liability is the effect it could have on individual liability. International criminal law has been focused on determining individual criminal liability since the Nuremberg trials. The decision to focus on individual culpability over organisational responsibility was made to ensure that individual actors were being held responsible for the crimes they committed and not for the crimes of others.[80] However, the goals of ending criminal activity and preventing its reoccurrence cannot be achieved through the imposition of individual criminal liability alone.[81] Sanctioning both the organisation and the individuals who control the organisation is the only way to successfully ensure that there is no accountability gap when addressing human rights violations.[82] Directly prosecuting and punishing the organisation will motivate it to improve its monitoring of its own actions and should promote different future behaviour leading to a change in corporate culture.[83] Holding organisations accountable will also guarantee that responsibility for atrocity crimes will be properly assigned, particularly when it is impossible to determine individual responsibility. Instances of this can include: when the culpable individual cannot be identified or located; when the corporate structure is too complicated to accurately identify culpable individuals; or when the corporation's actions cumulatively constitute a crime but the actions of any one individual do not.[84] Organisational criminal liability minimizes these problems and generates greater overall accountability. It also reduces the danger of trials being viewed as producing a form of partial justice, or from being derided as scapegoating, because it guarantees that all responsible parties are held accountable for their actions.[85] This is a particular danger when the individual stands accused of a collective crime 'committed by and in

[80] Gerry Simpson, 'Men and Abstract Entities: individual Responsibility and Collective Guilt in International Criminal Law', in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 87.
[81] André Nollkaemper, 'Introduction', in André Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 4.
[82] Caroline Kaeb, 'The Shifting Sands of Corporate Liability Under International Criminal Law' (2016) 49 *George Washington International Law Review* 351, 382-83.
[83] Kyriakakis Complementarity Issues Laid Bare (n 58) 149.
[84] Ibid at 148; Kremnitzer (n 59) 913; Lee James McConnell, *Extracting Accountability from Non-State Actors in International Law: Assessing the Scope for Direct Regulation* (Routledge 2017) 117.
[85] Simpson (n 80) 94.

the name of' a group of which they are an employee or member.[86]

Incorporating organisational criminal liability into international criminal law does not mean that individuals should no longer be held responsible for atrocity crimes when those crimes can also be attributed to an organisation. Even if organisational liability is recognised it does not change the facts that individual accountability remains the focus of international criminal law or that the goal of international criminal trials is to properly apportion blame to all culpable parties.[87] Further, organisational liability without individual liability would lead to impunity on the part of the individual by encouraging individual decision-makers to enact organisational practices that will further his or her own interests without concern for the effect of those actions on the organisation.[88] Organisational criminal liability is not meant to upset the existing legal order. It is intended to augment individual criminal responsibility and create an all-inclusive approach so as to close the existing impunity gap and strengthen human rights protections.

Linking organisational liability to individual liability is not a new idea. In fact, it was suggested in a working paper on criminal responsibility presented during the Rome Conference by the Working Group on General Principles of Criminal Law. The proposal directly tied the criminal liability of juridical persons to that of natural persons by mandating that an individual must be charged if a juridical person was also to be charged.[89] Importantly, charges could only be brought against a juridical person when the natural person had been convicted of the crimes charged.[90] This approach to organisational liability would guarantee that both responsible parties would be held accountable for their actions, thus closing the impunity gap in human rights protections. Ultimately, this proposal was not adopted. Per Saland, the chair of the Working Group noted that 'all delegations had recognized the great merits of the relevant proposal, but some had felt that it would perhaps be premature to introduce that notion.'[91] The delegates chose to conform to the status quo and adopt a Statute

[86] Fletcher (n 32) 1514.
[87] Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012) 6; Simpson (n 80) 87.
[88] Kaeb (n 82) 383.
[89] *Working Paper on Article 23, paragraphs 5 and 6* (n 25) 252.
[90] Ibid.
[91] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the Meeting of the Committee

that took a more traditional approach to criminal liability.

Conclusion

The proposal to allow both individual and organisational criminal liability may have been seen as premature during the Rome Conference but it is an idea whose time has come. The Universal Declaration of Human Rights secures for every person the rights to 'life, liberty and security of person.'[92] To that end, they are entitled to an effective remedy for violations of those rights and the protection of the rule of law.[93] However, a remedy can only be effective if the parties responsible for violations can be held accountable. Apportioning responsibility to parties for their actions that violate another's human rights through the imposition of criminal sanction is what links international criminal law with international human rights law.[94] It is this connection that allows for the enforcement of human rights norms and encourages the greater enhancement of human rights protections.[95] To achieve this goal it is necessary to hold to account all parties involved in the perpetration of human rights abuses and atrocity crimes, regardless of whether they are an individual or a collective. The AUC affiliated paramilitary groups in Colombia may not have been able to commit crimes against humanity and war crimes without the financial support of Chiquita. The sexual abuse of children by United Nations' peacekeepers in the Central African may have been prevented if a culture of impunity has not been allowed to flourish. Chiquita and the United Nations should not be able to escape responsibility simply by virtue of their existence as entities rather than individuals. If the promises of the Universal Declaration are to mean anything then criminal liability must be understood to encompass all possible culprits, including organisations, to create the broadest and most dynamic human rights system achievable.

---

as a Whole, Doc No A/CONF.183/C.1/SR.26 (8 July 1998) *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Reports and other documents)* vol 2 (1998) 275.

[92] Universal Declaration of Human Rights (n 1) art 3.

[93] Ibid at preamble and art 8.

[94] Simpson (n 80) 73.

[95] Ibid.